

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID PETER LAVALLIS,

Defendant-Appellant.

UNPUBLISHED
February 26, 2008

No. 276991
Oakland Circuit Court
LC No. 2003-190435-FH

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

The Michigan Supreme Court remanded this case as on leave granted.¹ Defendant David Lavallis challenges his sentence of 50 months to 30 years in prison imposed on his plea-based conviction of arson of a dwelling house.² We vacate Lavallis's sentence and remand this case for resentencing. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Lavallis pleaded nolo contendere to arson of a dwelling house in exchange for dismissal of other charges. The trial court agreed to delay sentencing for ten months in order to give Lavallis an opportunity to make restitution. At sentencing, the prosecution argued that offense variable (OV) 9 should be scored at 25 points for ten or more victims.^{3,4} The prosecutor counted as "victims" the three-person family living in the unit directly above the unit in which Lavallis set the fire, the person who owned the unit in which Lavallis set the fire, three insurance companies that paid benefits as a result of the fire, and several other residents of other units who were identified by an occupant of the building. The trial court agreed that OV 9 should be scored at 25 points. The revised guidelines, as adjusted for Lavallis's status as a second offense

¹ *People v Lavallis*, 477 Mich 1044; 728 NW2d 411 (2007).

² MCL 750.72.

³ MCL 777.39(1)(b) (scoring based on number of victims).

⁴ The prosecutor also challenged the scoring of other OVs, but Lavallis does not address the scoring of these OVs on appeal.

habitual offender,⁵ recommended a minimum term range of 24 to 50 months' imprisonment. The trial court sentenced Lavallis to 50 months to 30 years in prison. This Court denied Lavallis's application for leave to appeal. Lavallis sought leave to appeal to the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted.

II. Sentencing

A. Standard Of Review

We review de novo the proper interpretation and application of the sentencing guidelines.⁶ In calculating the sentencing guidelines, the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score.⁷ A scoring decision for which there is any evidence in the record will be upheld.⁸ We review a trial court's scoring of the guidelines to determine whether that court properly exercised its discretion and whether the evidence supports the scoring decisions.⁹ We review for clear error the trial court's findings of fact.¹⁰

B. Scoring Considerations

At the time of sentencing in this case, OV 9 was properly scored at 25 points if "[t]here were 10 or more victims."¹¹ At that time, OV 9 also provided that "each person who was placed in danger of injury or loss of life" was to be counted as a victim.¹² Under that version of OV 9, a victim who suffered only financial injury was not to be counted as a victim for purposes of scoring OV 9.¹³ 2006 PA 548, effective March 30, 2007, amended MCL 777.39(2)(a) to provide that "each person who was placed in danger of physical injury or loss of life *or property*"¹⁴ was to be counted as a victim. However, because the amendment became effective after sentencing in this matter, it does not apply to this case.

⁵ MCL 769.10.

⁶ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

⁷ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁸ *Id.*

⁹ *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

¹⁰ *Id.*

¹¹ MCL 777.39(1)(b), as enacted under 1998 PA 317.

¹² MCL 777.39(2)(a), as enacted under 1998 PA 317.

¹³ *People v Melton*, 271 Mich App 590, 595-596; 722 NW2d 698 (2006).

¹⁴ (Emphasis added).

C. Applying The Standards

(1) The Insurance Companies

The prosecutor concedes that the insurance companies that paid benefits cannot be counted as victims for purposes of scoring OV 9 in this case.

(2) The Occupants Of The Unit Directly Above The Burned Unit

The evidence showed that two members of the three-person family who lived in the unit above the unit that Lavallis set on fire were at home at the time of the fire. Therefore, they qualified as victims for purposes of scoring OV 9. However, the other member of the family was away from the building at the time; thus, he was not placed in danger of physical injury and could not be counted as a victim for purposes of scoring OV 9.

(3) The Owner Of The Burned Unit

The owner of the unit that Lavallis set on fire was not at home when the fire occurred; thus, he could not be counted as a victim for purposes of scoring OV 9.

(4) Other Residents

According to the prosecutor, the woman who lived in the unit above the unit that was burned stated that a man who worked nights was at home when the fire occurred. Although the prosecutor also indicated that some other units were occupied on the day of the fire, no evidence showed that those persons were at home at the time the fire occurred.

(5) Firefighters

Two firefighters entered the building before the fire was extinguished, and a person who intervenes after the fact may be considered a victim.¹⁵

(6) Conclusion

The evidence supported a finding that approximately four or five persons were placed in danger of injury or loss of life. Under the version of OV 9 applicable at the time of Lavallis's sentencing, the trial court should have scored ten points because "[t]here were 2 to 9 victims."¹⁶ Had the trial court scored OV 9 at ten points, the guidelines would have recommended a minimum term range of 21 to 43 months, and as a result, Lavallis's minimum term exceeded the properly scored guidelines, and he is entitled to be resentenced under properly scored guidelines.

We note that Lavallis's assertion that the trial court was required to base guidelines scoring decisions only on facts found beyond a reasonable doubt, as established by *Blakely v*

¹⁵ *Morson, supra* at 262.

¹⁶ MCL 777.39(1)(c), as enacted under 1998 PA 317.

*Washington*¹⁷ is without merit. The Michigan Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme.¹⁸

We vacate Lavallis's sentence and remand this case for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis

¹⁷ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹⁸ See *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006).